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ON MOTION

In the

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 19, Original.

THE STATE OF NEW MEXICO

vs.

THE STATE OF COLORADO.

REPLY BRIEF ON MOTION TO STRIKE OUT PARTS OF ANSWER

Defendant's brief on said motion was received by counsel for complainant on October 1, 1921, although defendant's attorney general had had a copy of the motion and argument in support thereof for more than 15 months previous. I feel compelled to make some reply to defendant's brief as I do not, at present, feel that I ought to incur the expense involved in a journey of over 2,000 miles to make oral argument upon such a motion.

Defendant's brief first attempts to set up the petty point that, because the complainant has filed a replication to the answer, it has admitted that the answer is sufficient, and therefore complainant cannot properly raise any question as to the sufficiency of the answer by a motion to strike out parts thereof. This effort to avoid any consideration of the motion itself, does not appear to be made seriously as the defendant then proceeds to discuss the merits of the motion. Reference to the replication will, I believe, show the absurdity of this position of the defendant, for, as I recollect, not having at hand a copy thereof, it is carefully limited to so much of the answer as is not attacked

by the motion to strike out. Moreover, under Rule 31 of the Equity Rules of Practice, no replication is required to put a case at issue, unless the answer assert a set-off or counterclaim, but in this case where complainant sought to strike out parts of the answer, so as not to be considered as taking issue upon immaterial allegations of fact, it seemed proper to file a limited sort of replication at the same time with the motion to strike out what was deemed immaterial. No further attention will be given to this attempt to avoid the question raised by the motion which seeks, as stated in the argument in support thereof, "only to get rid of immaterial and irrelevant matters, and to avoid the presentation of testimony as to such matters which would unnecessarily encumber the record and could have no effect except to confuse and delay."

The argument contained in defendant's brief may be condensed into a very short statement. The record discloses, and the argument in support of the motion as well as the brief of defendant, distinctly declares, that two official surveys have been made of the boundary line between Colorado and New Mexico, one by a man named Darling in 1868, which was approved by the Commissioner of the General Land Office, and another by a man named Carpenter in 1902-3, which was also approved by the Commissioner of the General Land Office. Defendant relies on the Darling survey while the complainant rests its case upon the correctness of the Carpenter survey which differs from the other. Defendant argues that it makes no difference which survey is correct; that the Darling survey must prevail because it is the senior survey and is therefore superior to the other even though it may not be on or anywhere near, the thirty-seventh parallel of latitude, declared by Congress, by the Constitution of Colorado and by the Constitution of New Mexico, to be the boundary line between Colorado and New Mexico. If Darling had located the line on the thirty-sixth parallel and said it was on the thirty-seventh parallel, and a correct survey on the thirty-seventh parallel were made thirty years later, defendant's contention is, in effect, that the earlier survey, although

a whole degree of latitude away from where it ought to be, must prevail on account of its age.

The real argument to be found in the defendant's brief, however, is based upon the doctrine set out in the case of Missouri v. Iowa, 7 How., page 660, which is that a state is in such privity with the United States as to matters antecedent to the admission of the state into the Union, that it is bound by what the Un...d States may have done while the state was a territory and unable to assert any rights for itself. This might be good ground for sustaining the matter in the fifth subdivision of the answer, which is objected to by the motion to strike out, were not the statements therein contained as to the action of the United States, substantially contradicted by what appears in the record so far as it has gone. Those statements will be found set out at pages 4 and 5 of the argument in support of the motion, and at pages 14 and 15 of defendant's brief. They are in substance that the Darling line has been generally recognized and acquiesced in by both states and accepted by the federal government and is now recognized and accepted by the federal government as the true and subsisting boundary line between Colorado and New Mexico.

As to the allegation that the Darling line has been recognized and acquiesced in by both states, the attention of the court is again called to the fact that New Mexico, as a state, never had the power to recognize or acquiesce in anything until after January 6, 1912, and the institution of this suit within a reasonable time thereafter is a distinct contradiction of this assertion.

As to the statement that that line has been recognized and accepted by the federal government, this also is substantially contradicted by what appears in the record, which distinctly shows that this case is not like the case of Missouri vs. Iowa, relied on by defendant, in which, at pages 678-9, this court said:

> "And the court further finds, that the State of Iowa is estopped from setting up claim to a line south of the old Indian boundary, known as Sullivan's line, as said state, by her cross bill, assumes to do; because her predecessor, the United States, by many acts, and by

uniform assumptions, up to the time when Iowa was created, in December, 1846, recognized and adopted Sullivan's line as the proper northern boundary of the State of Missouri; and that the State of Iowa is bound by such recognition and adoption."

And at page 673 of the opinion in that case the court said:

"From the time that Missouri became a state to this day, Sullivan's line has been recognized by the United States as the true northern boundary of Missouri, so far as it could be done through the department of public lands."

In the present case it appears by clear statements in the pleadings and by necessary inferences therefrom, that the United States has not "by uniform assumptions" up to the time that New Mexico was created, recognized and adopted the Darling line as the proper southern boundary of the State of Colorado, nor recognized it as such boundary from the time that Colorado "became a State to this day." It must be clear that both the legislative and executive departments of the government have not so recognized and accepted the Darling line. It is distinctly averred that the Darling line was by the land department established and approved in 1868, and that, by the same department, the Carpenter line was established and approved in 1903. These surveys cannot have been made without authorization of congress, and we find such authority for the Carpenter survey in the statutes. A like authority can be found for the earlier Darling survey, at page 466 of 14 Stat. at Large.

In the Deficiency appropriation bill for the fiscal year ending June 30, 1902, which is Chapter 1351 in 32 Stat. at Large at page 574, is the following:

"BOUNDARY LINE, COLORADO, NEW MEXICO AND OKLAHOMA:

"For the re-survey and re-establishment of the line of the thirty-seventh parallel of north latitude, for the boundary line between the State of Colorado and the Territories of New Mexico and Oklahoma, which is coincident with said parallel between

the twenty-fifth and thirty-second degrees of longitude west from Washington, at a rate per mile to be fixed by the Secretary of the Interior, and for the examination in the field of said survey, a calculated distance of three hundred and eighty-seven and one-tenth miles, to continue available during the fiscal year of nineteen hundred and three, thirty-one thousand five hundred dollars."

And in Chapter 1007, in the same volume, which is the Sundry Civil appropriation bill for the fiscal year ending June 30, 1904, at page 1117, is the following:

"The appropriation of thirty-one thousand five hundred dollars for the re-survey and re-establishment of the boundary line between the State of Colorado and the Territories of New Mexico and Oklahoma, contained in the Act of Congress approved July first, nineteen hundred and two, making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and two, and for prior years, and for other purposes, is hereby continued and made available until June thirtieth, nineteen hundred and four."

We have here another legislative declaration that the thirty-seventh parallel of north latitude is the boundary line, and a direction for its re-survey which would be quite unnecessary if the United States had recognized, or did then recognize, the Darling survey as having fixed the boundary line where it ought to be; and it is unthinkable that congress would have acted as it did on this subject, except in pursuance of recommendations from the Land Department.

By reference to Senate Document No. 89, 58th Congress, 3d Session, there will be found in a letter from the Acting Commissioner of the General Land Office, a resumé of the attempts by the land department to ascertain where the boundary was, clearly showing that that department did not, as in the Missouri-Iowa case, recognize a line "so far as it could be done" as the state boundary of Colorado. It shows also the condition of ascertained defects and inaccuracies in the Darling survey which led to the making of the Carpenter survey. It shows that there

were "wide stretches of the line in certain places unmarked in any manner"; that in one locality the investigations of an examiner of surveys made it "apparent that in that locality very few traces of the boundary line as established by E. N. Darling were to be found, and such as were found were not by any means on the same parallel of latitude."

The following further quotation from that letter indicates fully that the land department did not recognize the Darling line:

> "In 1873 it became necessary to establish the east boundary of the southern Ute Indian reservation in Colorado, the same being the one hundred and seventh meridian as extended north from the thirty-seventh parallel, the south boundary of the state. Under instructions from this office, R. C. Darling, United States surveyor, established at a point on the E. N. Darling line the southeast corner of the said reservation estimated as on the one hundred and seventh meridian. A question having arisen as to the correctness of such location, S. S. Gannett, of the Geological Survey, in 1897 determined for the Indian office the true location of said reservation corner by astronomical observations.
>
> "His attempt to find a public land corner with which to connect his determination having developed the absence of such corners, an extended examination of the E. N. Darling line both east and west thereof was made by Frank A. Johnson, examiner of surveys, under the direction of this office. As a result of his investigations it became apparent that in that locality very few traces of the boundary line as established by E. N. Darling were to be found, and such as were found were not by any means on the same parallel of latitude.
>
> "The fact was developed that Darling's astronomical station No. 7, which was established near the present town of Edith, was lost, and while its approximate location was fixed by the bearings to the several mountain peaks reported by Darling, no trace of the monument itself remained.
>
> "These astronomical monuments were established by Darling as a result of a series of astronomical observations for latitude, and between these monuments the parallel was marked by corners either at mile points, or when the nature of the country was such as

not to permit the corners to be so established, then witness corners were established at accessible points.

"Astronomical monument No. 6 was established at a distance of 34 miles east of No. 7, and astronomical monument No. 8 at a distance of 27 miles west of No. 7. From astronomical monument No. 6, Examiner Johnson, in 1900, identified the Darling line westward for a distance of 15 miles, at which point all traces of the old line were lost and could not be identified in any manner, the topography not agreeing with the original notes in any particular, the old blazes disappearing and the country not being that described in the Darling field notes. The first corner identified west of this point was at a distance of about five miles, where an old corner was found, much decayed and lying on the ground, but identified as being in its original location by the bearing trees. The mile corner was about 11 chains south of the last trace of the line found to the east, and from it a portion of the line for a distance of about five miles was identified, beyond which, to the west, all traces of the mile corners had disappeared. Indications of a line were found only by means of old blazes on trees and topographic features, which themselves disappeared as the line approached the location of astronomical monument No. 7.

"When this latter point was reached, there was a difference of nearly half a mile in the locations of the line brought from the east and of the point identified as the most probable location of the monument itself, which, as before stated, had been lost. From this location west to astronomical monument No. 8 the corners established by Darling were few in number, on account of the alleged precipitous character of the country over which the line ran. Long triangulations were used, and in the distance of some 27 miles only 9 corners were established. Of these 9 corners, partial identification was made of 2 only, and upon these facts being reported to the department, this office was directed, by letter dated May 9, 1902, to furnish an estimate for the re-survey and re-establishment of the thirty-seventh parallel between the twenty-fifth and thirty second degree of longitude, in order that the same might be submitted to Congress."

In the same document there is to be found another letter from the General Land Office to the Secretary of the Interior

dated May 24, 1904, which more fully sets out conditions concerning the boundary now in controversy and the following quotation covers the whole of that letter:

"DEPARTMENT OF THE INTERIOR,
"General Land Office.

"Washington, D. C., May 24, 1904.

"Sir: The question arises as to the force and effect to be given to the survey of the south boundary line of the State of Colorado, which forms the north boundary of the Territories of New Mexico and Oklahoma, which was recently made under the act of July 1, 1902 (32 Stat. L., 574), and as to what further action is necessary in the premises.

"A recital of the history of this boundary is necessary to a full consideration of the question, and I therefore beg to submit that section 2 of the enabling act of March 3, 1875 (18 Stat. L., 574), under which the State of Colorado was admitted into the Union, fixes this boundary 'along the thirty-seventh parallel of north latitude,' this being the line which had theretofore been declared the south boundary of the Territory of Colorado in section 1, act of February 28, 1861 (12 Stat. L., 172).

"This line was surveyed and marked in 1868 by Ehud N. Darling, surveyor and astronomer, on behalf of the Government, but the accuracy of that survey was afterwards called in question, and, many of the monuments along the line having disappeared, the general assembly of the State of Colorado, by its act of April 11, 1901, authorized the appointment of a commissioner to act in conjunction with like representatives to be appointed by authority of the territorial assembly of New Mexico and your department, should such representatives be appointed, or independently if they were not appointed, for the purpose of fixing and determining 'the south boundary line of the State of Colorado, and between said State of Colorado and the Territory of New Mexico, between astronomical monument No. 6, heretofore established on the thirty-seventh parallel of north latitude and at a point on said parallel near Osier, Colo., and extending thence westward along said thirty-seventh parallel, fixed as the southern boundary line of Colorado by said act of Congress and heretofore surveyed by Ehud N. Darling

for the United States, and astronomical monument No. 8, also established by said Darling on said parallel at a point about 4 miles west of Arboles, Colo., and to re-survey and re-establish said line, as hereinbefore surveyed and established by Darling, between said monuments.'

"No representative was ever designated by your department to act in conjunction with the commissioner provided for in this act, and this office is not informed as to whether the state ever took any action thereunder.

"The condition of this line having been called to the attention of your department, an examination in the field was made by Examiner Frank M. Johnson, whose report was submitted to your department by this office on April 30, 1902. This report not only disclosed the fact that some of the astronomical monuments were missing, but showed that the line as established by Darling was not in some places located upon the thirty-seventh parallel. By your letter of May 9, 1902, you stated: 'In view of the condition of this line, as declared by this examination, and of its importance as a boundary between the State of Colorado upon the north and the Territories of New Mexico and Oklahoma upon the south, it is deemed advisable that it should be re-surveyed and re-established;' and you accordingly directed this office to at once furnish your department with an estimate 'for the re-survey and re-establishment of the thirty-seventh degree of north latitude between the twenty-fifth and thirty-second degrees of longitude west from Washington to be submitted to Congress.'

"In response to the recommendations of your department Congress by its act of July 1, 1902 (32 Stat. L., 574), made appropriation 'for the re-survey and re-establishment, on the line of the thirty-seventh parallel of north latitude, of the boundary line between the State of Colorado and the Territories of New Mexico and Oklahoma, which is coincident with said parallel between the twenty-fifth and thirty-second degrees of west longitude from Washington * * * a calculated distance of 381 miles,' and it was pursuant to this act that the line has been re-surveyed and re-established by Howard B. Carpenter, United States surveyor and astronomer, on that parallel.

"Prior to this re-survey the town of Edith was

supposed to be in the State of Colorado, the old state boundary line being in doubt at that point. Mr. Carpenter's survey shows the greater part, if not all, of the town to be in New Mexico. An examination of the field notes and plats of this survey shows that the line established by Carpenter passes through the villages of Ortiz and La Costilla, all of which have heretofore been assumed to lie in the State of Colorado. This line is continuously marked by iron posts at mile intervals, and with eight large stone monuments marking the points of astronomical stations where observations were taken for determination of the parallel and these markings should tend to remove all doubt as to the question of jurisdiction when the line has been properly declared to be the boundary.

"The question now arises as to what further action is necessary to be taken, and in this connection the fact should be noted that the intention expressed by the general assembly of Colorado, in making provisions for the re-establishment of this boundary, does not fully coincide with the directions given by Congress. The general assembly directed the re-establishment of only a portion of this line, while Congress declared that the entire boundary should be re-established. The general assembly directed its commissioner 'to resurvey and re-establish said line, as heretofore surveyed and established by said Darling, between said astronomical monuments," while it was the intention of Congress that the line should be re-established and re-located upon the thirty-seventh parallel, regardless of any lines or monuments established by Darling.

"The power to determine controversies over boundaries arising between states, or between the National Government and any state, appears to be vested alone in the Supreme Court. Article 9 of the Articles of Confederation, 1777, declared that Congress should 'be the last resort of appeal in all disputes and differences now subsisting, or that may hereafter arise, between two or more states concerning boundary, jurisdiction, or any other cause whatever,' but no such power as this was vested in Congress by our Constitution. Its section 2, article 3, declares that the original power of the Government 'shall extend to all * * * controversies to which the United States shall be a party; to controversies between two or more states,' etc., and under this clause the Supreme Court has repeatedly as-

serted and exercised its original jurisdiction in hearing and determining controversies over the boundaries between states. (See R. I. v. Mass., 12 Pet., 657; N. J. v. N. Y., 5 Pet., 284; Mo. v. Iowa, 7 How., 606; Fla. v. Ga., 17 How., 478; Ala. v. Ga., 23 How., 505; Va. v. W. Va., 11Wall., 39; Mo. v. Ky., 11 Wall., 395; Ind. v. Ky., 136 U. S., 479; Neb. v. Iowa, 143 U. S., 359; Va. v. Tenn., 148 U. S., 503.)

"These, however, were controversies arising between individual states, and it was not until the case of United States v. Texas was considered (143 U. S., 621) that the Supreme Court declared that it had original jurisdiction in a suit in equity brought by the United States against a state to determine the boundary line between that state and a territory of the United States, and that that question is susceptible of original determination. A careful reading of this case discloses the opinion of the Supreme Court to the effect that the National Government in its relation to state governments occupies the status of a state, and that any controversies which arise between it and states over the boundaries between states and territories must be settled by a proper action in that court, and nowhere have I been able to find that Congress has ever been recognized as having any power to determine such a question. Congress would, of course, have the power to fix or alter boundary lines between territories, but after a boundary line of a state has been solemnly declared by its enabling act it appears that the Supreme Court is the only branch of the Government that has power to determine controversies thereon.

"If this conclusion is correct, then neither Congress, by directing the survey of this line, nor your department, by causing that survey to be made and approved, has performed an act which is binding upon the State of Colorado in the absence of its recognition or ratification of those acts.

"It is true that this case does not present a question exactly like the question which arises between the Government and Texas over the boundary in dispute between them. There it was a question as to whether one river or another formed a boundary line, while here there can be no dispute as to the fact that the line between Colorado and New Mexico, should be on the thirty-seventh parallel, yet there may be a dispute as to whether the monuments marking the line established

by Carpenter are located upon that parallel, and until all possibility for the arising of such a dispute has been eliminated the Government can not with safety recognize the boundary as having been established beyond controversy.

"In view of the fact that the executive branch of the Government has no inherent powers in this matter, and has only acted in obedience to the will of Congress in making this survey, it is the opinion of this office that the result of that survey should be reported to Congress for its consideration and to form the basis of any negotiations which it may deem necessary to induce the State of Colorado to adopt the line so established as the true boundary line or to have the matter determined by proper action in the Supreme Court.

"Very respectfully,

"W. A. RICHARDS, *Commissioner.*

"THE SECRETARY OF THE INTERIOR."

The same document contains a letter from the Secretary of the State of Colorado addressed to the Secretary of the Interior inquiring if the boundary line between Colorado and New Mexico had been established by the United States Government, in response to which the Department sent the Secretary of State a copy of a report by the Acting Commissioner of the General Land Office dated July 28, 1904, which is also printed in the same document.

The remainder of the letter gives information about the contract with Carpenter, his survey thereunder, and as to inaccuracies in the Darling line so far as it could be found.

Inasmuch as the bill of complaint and answer show the making of the two surveys, it does not seem improper thus to refer to public documents which throw light on the subject of those surveys, and which may assist the court in the consideration of the propriety of the matter in the answer which is assailed by the motion to strike out.

Moreover, by reference to Chapter 37 of the Colorado Session Laws of 1901, it will appear that even Colorado was not

satisfied with the Darling survey nor acquiescent as to its correctness.

Briefly, if any such status existed as to this boundary as is described in the case of Missouri vs. Iowa, 7 How., 660, as to the boundary there in question, there never would have been any Carpenter survey, official in character and approved by the Land Office, and the court may, with propriety, take notice of anything relating thereto in the public records which can inform the judicial mind.

It is respectfully submitted that the motion to strike out parts of the answer, should be granted.

FRANK W. CLANCY,
Special Counsel for Complainant.